IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1767

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS,
Petitioner,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, National Society of Professional Engineers ("NSPE"), requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered on March 14, 1977.

OPINIONS BELOW

The opinion of the Circuit Court (per Judges Wright, Tamm and Leventhal) from which this Petition is taken is not yet reported. It appears in the Appendix hereto at A-2.[1] The first District Court opin-

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[1] Citations to the Appendix hereto are in the above form. The Joint Appendix in the Court of Appeals is cited as "J.A."

ion herein, dated December 19, 1974, is reported at 389 F. Supp. 1193. The District Court entered judgment on December 31, 1974, from which direct appeal to this Court was taken. On June 23, 1975, this Court, as reported at 422 U.S. 1031, unanimously vacated the District Court judgment, awarded costs to NSPE, and remanded for further consideration in light of *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975). On November 26, 1975, the District Court reinstated its judgment without modification. A-15-A-20. The second District Court opinion, of that date, is reported at 404 F. Supp. 457. On December 4, 1975, the District Court denied NSPE's application under 15 U.S.C. § 29 for permission to appeal directly to this Court. A-14. The Circuit Court affirmed the District Court judgment except to the extent the Circuit Court held NSPE's First Amendment rights were infringed thereby.

JURISDICTION

The Court of Appeals judgment was entered on March 14, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the rule of reason applies in an antitrust attack on professional ethics governing the solicitation of work by bidding.

2. Whether a provision of a profession's code of ethics which states the same policy against fee bidding for professional services as the policy stated in United States statutes and regulations, and state statutes, regulations and judicial decisions, is reasonable and thus not illegal under Sherman Act Section 1.

3. Whether the judgment herein, prohibiting Petitioner from stating views or advocating a policy Petitioner believes essential to public safety, abridges Petitioner's First Amendment rights.

4. Whether this Court's mandate herein required the District Court to consider the record evidence regarding the reasonableness of the ethical rule at issue.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment, Sherman Act § 1 (15 U.S.C. § 1) and the Brooks Act (40 U.S.C. §§ 541-44) (Supp. II, 1972) are principally involved. Numerous other United States and state statutes and regulations prescribe the same policy against obtaining professional engineering work by fee bidding as that set forth in the Brooks Act and in Petitioner's Code of Ethics. The statutes involved appear at A-21-A-50.

STATEMENT OF THE CASE

Respondent seeks to enjoin Petitioner, NSPE, from promulgating Section 11(c) of its Code of Ethics or advocating the policy stated therein. The NSPE Code of Ethics appears at A-50-A-59.

This antitrust case, which has been pending since 1972, has generated opinions, orders and mandates from the District and Circuit Courts and this Court. However, to date, notwithstanding Petitioner's efforts, no court has considered—indeed, the District and Circuit courts expressly rejected consideration of—the evidence relating to the reasonableness of the ethical provision.[2] The District and Circuit courts construed the law to prohibit consideration of that evidence.[3]

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[2] 389 F. Supp. at 1199; A-8.

Petitioner is a non-profit national professional society with more than 70,000 members located throughout the United States.[4] It defended this case to obtain a definitive ruling on the merits of the long-standing ethical canon, confident that consideration of the facts would vindicate the profession and protect the public. To date, that objective has been frustrated by the unprecedented application herein of the *per se* rubric to professional ethics. The merits of the ethical rule in the context of engineering practice have not been addressed by any court in this case.

The ethical principle at issue—holding it improper for engineers to solicit work by fee bidding—dates back at least to 1911[5] and can be understood only in the unique context of engineering practice. Engineering is the profession whose practitioners apply science to solve technological problems for human welfare.[6] Arriving at the tentative conceptual solution to an engineering problem is an extremely complex matter, requiring judgmental choices among innumerable alternative decisions, approaches and techniques.[7] Determination of those choices is dependent on extensive client-engineer consultation.[8] The variety and complexity of those choices are such that before he consults extensively with his prospective client, and makes an engineering analysis, it is impossible for an engineer to specify or his client to know what engineering services are to be rendered.[9] This is true, as the evidence shows, with regard to each prospective assignment involving design of an office building, a school, a nuclear power plant, a sewage system, a bridge, a hospital or any other structure affecting public safety.[10] In each such case, one sixth to one third of the engineering work required is involved in identifying the problem, analyzing it preliminarily and proposing a tentative conceptual solution.[11] The tentative conceptual solution discloses for the first time the nature, scope and complexity of, and the proposed approach to, the assignment.[12] The ethical provision at issue says that the engineer cannot ethically fee bid before he has done that initial work in consultation with the prospective client—before the engineer can possibly know what he is bidding on.[13]

Abolition of the ethical prohibition against soliciting engineering work by bidding would endanger the pub-

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[3] *Id.*

[4] J.A. 9944.

[5] By 1911, the American Institute of Consulting Engineers is known to have had the following provision among its stated ethics:

> To compete with a fellow Engineer for employment on the basis of professional charges, by reducing his usual charges and attempting to underbid after being informed of the charges named by his competitor [is unethical]. E. Heermance, Codes of Ethics 166 (1924).

This principle was incorporated in NSPE's Code of Ethics when the Code was adopted in 1964. J.A. 9951.

For a discussion of early codes of ethics in the engineering profession *see* The Annals of the American Academy of Political and Social Science 68-104 (May, 1922).

[6] J.A. 1098.

[7] J.A. 50, 53, 366-71, 1624-25, 1627-28, 1784-85.

[8] *Id.*

[9] J.A. 175-80, 374-77, 1152-53, 1633-34, 1638-39, 3349.

[10] J.A. 50, 53, 366-71, 1624-25, 1627-28, 1784-85.

[11] J.A. 1153, 1627-28.

[12] J.A. 50, 53, 366-71, 1624-25, 1627-28, 1784-85.

[13] J.A. 175-80, 374-77, 1152-53, 1633-34, 1638-39, 3349.

lic.[14] To understand why this is so, solicitation of an engineering assignment must be compared with solicitation of work in other fields. The evidence on this subject was explicitly disregarded by both lower courts.[15]

As used in occupations other than in engineering, "competitive bidding" means selection of a buyer or seller of a specified product or service on the basis of price proposals, and "requires that all bidders be placed on a plane of equality, and that they bid on the same terms and conditions." [16] One example of competitive bidding is an auction, where a specified article is sold to the highest bidder.[17] Competitive bidding is also often used in securing commercial goods and services, as in the construction industry where engineered plans and specifications state the services and goods the contractor is to supply, and amounts bid by contractors are, accordingly, comparable.[18]

In engineering the term "competitive bidding" has the diametrically opposite meaning. In engineering, "competitive bidding" means the solicitation of work by submission of a quoted fee before the engineer has had an opportunity to study or specify the problem involved, to determine a possible solution, or to ascertain the engineering work required to produce the design that will solve the client's problem.[19]

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[14] J.A. 262-65, 1036-37, 1044-45, 1284-86, 1634-35, 2003-05, 2012-14, 3349, 3379.

[15] 389 F.Supp. at 1199; A-8.

[16] Black's Law Dictionary 356 (4th ed. 1968).

[17] J.A. 2334.

[18] J.A. 377-78, 1226-28, 1466, 1638, 2334, 3349.

[19] J.A. 175-80, 374-77, 1152-53, 1633-34, 1638-39, 3349.

When an engineer solicits work by bidding a fee, neither he nor his client has specifications to go by.[20] Two engineers bidding to be retained prior to initial analysis and consultation with the prospective client are thus bidding to provide services which are undefined and which cannot be comparable. Instead of bidding "on the same terms and conditions" they are engaging in a lottery, since "competitive bids" in these circumstances can only be guesses.[21] There is no basis for comparison of engineers' fee bids because the client cannot determine the nature or amount of engineering work represented by different bids.[22]

Fee bids by engineers, in addition to being not comparable, misleading to the client, a form of bait-and-switch deception, false advertising, and a sham, jeopardize public safety.[23] This jeopardy is pervasive. The work of engineers affects every aspect of public safety and health. From the supply of water treatment systems, through the operation of intensive care units, and to the safety of classrooms, highways, hotels, airports, and other places of public congregation, public safety and health are dependent on highly competent and safe engineering design.[24]

Engineers who, contrary to their profession's ethics, solicit work by fee bidding desire to secure the work,

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[20] *Id.*

[21] *Id.*

[22] J.A. 410-12, 513-14, 1221-22, 1639, 1999, 3384-85.

[23] J.A. 48, 176-79, 262-65, 962-64, 1036-37, 1044-46, 1230, 1252, 1284-86, 1634-35, 1705, 2003-05, 2012-15, 3348-49, 3379.

[24] J.A. 43, 106-07, 130-32, 167, 357-38, 364-66, 680-85, 950-51, 27-28, 1031-40, 1046-47, 1104-05, 1150-52, 1219, 1230, 1252-56, 281, 12[illegible] 1734-35, 1780-82, 1984-89, 3389.

and therefore bid as low as possible.[25] Consequently the submission of a fee bid, before the design problem can be analyzed, limits the amount and quality of analysis ultimately applied to the problem.[26] The effort in such cases is to produce the cheapest design acceptable to the client.[27] The quality of the design is inexorably subordinated to the amount of the previously submitted bid.[28] Fee bidding in engineering results—and has resulted when perpetrated in the past—in unsafe design, injury and the loss of life.[29]

The record evidence on this point is uncontroverted. There is a demonstrated relationship between claims of negligent engineering work and bidding and fee cutting in the solicitation of engineering work.[30] In a recent seven-year period there were 17,500 such claims, with death or bodily injury involved in 15 percent of them.[31] This averages approximately 2,500 claims per year, with an average of one claim every day involving death or personal injury. The insurance carrier which provided liability insurance to sixty or seventy percent of the professional engineers in the country, and recorded and analyzed claims of inadequate engineering work, presented undisputed evidence that the

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[25] J.A. 375-76, 868, 1151-52, 1325, 1634-35, 3348-49, 3380.

[26] J.A. 178, 374-78, 838, 1469, 1634-36, 1647, 1657, 1931, 2005.

[27] *Id.*

[28] *Id.*

[29] J.A. 262-65, 1036-37, 1044-45, 1284-86, 1634-35, 2003-05, 2012-14, 3349, 3379.

[30] J.A. 1009-10.

[31] J.A. 991-98.

solicitation of engineering assignments by fee bidding materially increases the risk of unsafe engineering.[32]

Fee bidding for professional engineering work also results in higher construction and life-cycle costs;[33] frustrates competition in the construction of the designed structure, by subjecting contractors to inadequately developed engineering designs, thus preventing meaningful comparison of construction bids;[34] precludes the mutual trust indispensable to the client-professional relationship;[35] and reduces engineers to the standards of commercial rivalry characteristic of the marketplace.[36] In sum, fee bidding is irreconcilable with competent engineering.

The District Court made no findings on any of the foregoing evidence, holding that it "need not consider" the evidence because the *per se* rule applies.[37]

The appropriate and ethical method of retaining an engineer is essentially the same as the traditional method of retaining a lawyer or consulting a physician. The prospective client identifies one, two, three, four or more engineers or engineering firms, interviews them, obtains their qualifications, determines their backgrounds, and tentatively selects the one who, in the client's judgment, is best qualified and most suit-

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[32] J.A. 1009-10.

[33] J.A. 175, 178-80, 380-81, 516, 1147-48, 1224, 1635, 1647-48, 1657, 1931, 3349, 3384, 3413.

[34] J.A. 1025-27, 1227, 1239-41, 1630-31, 1633, 1994, 3349.

[35] J.A. 383-84, 692, 694-95, 1455-56, 1506-07, 1645-46, 1999-2005.

[36] J.A. 718-19, 837-38, 969, 1506-07, 1673, 1999-2001, 2325-26.

[37] 389 F.Supp. at 1199.

able.[38] Thereafter, the client and the tentatively selected professional discuss and preliminarily analyze the problem.[39] A tentative approach is determined.[40] *Then* they discuss the proposed fee.[41] Should they for any reason not agree on a fee, the client is free to approach another practitioner.[42]

The ethical prohibition against soliciting professional engineering work by bidding applies *only* to work which immediately affects public safety.[43] For example, study contracts which involve providing a specified amount of work and reporting the result, and which do not involve engineering design that may endanger the public, may ethically be awarded on the basis of bidding.[44] Research and development work, which does not immediately affect public safety, is likewise outside the ethical rule's scope.[45] Other excluded areas were also cited in the record.[46] Identification of the situations in which public safety is at risk, and of the professional standards that must be followed to provide a safe result, is peculiarly a matter for professional judgment.[47] Ethical principles have been devel-

[38] J.A. 9970 (Finding No. 45).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] J.A. 1788-90, 2549-50, 2575-76, 2599-2600, 2620-21, 2667, 2751-52, 2788-89, 2805.

[44] *Id.*

[45] *Id.*

[46] *See, e.g.*, J.A. 1788, 2551.

[47] J.A. 353-58, 596, 617-19, 954-55, 1220, 1255, 1443-46, 1460, 1463, 1981-82, 2007-08; Defendant's Exhibit ("DX") 1 at 3.

oped over several generations to protect the public against unsafe engineering.

Statutes, regulations and judicial decisions in more than 30 states—virtually every state which has acted on the subject—prohibit fee bidding as a method of obtaining engineering services. In 14 additional states, where there is no clear official pronouncement, it appears to be against state policy. At least 49 state court decisions—every decision on the subject known to counsel—from courts in states throughout the United States, declare fee bidding an improper method of obtaining professional services. These authorities are cited in the record, as are the legislative histories and texts of the many United States statutes and regulations which also prohibit the practice prohibited by Section 11(c) of Petitioner's Code of Ethics. *See* A-21-A-50; A-60-A-62.

CIRCUIT COURT HOLDINGS

The unusual posture in which this case came to the Circuit Court, whereby the record evidence respecting the ethical rule's reasonableness had been expressly disregarded by the District Court, resulted in fundamental errors and misconceptions in the Circuit Court opinion. The Circuit Court opinion, like the District Court's, omits analysis of that evidence. It also omits, as did the District Court, reference to the United States and state laws which dictate the same policy as that contained in the ethical rule. While holding that the District Court's findings of fact "were not clearly erroneous," [48] the Circuit Court neglected to state that

[48] A-5.

the District Court made no findings on the issue of reasonableness, but essentially found only that engineering practice substantially affects interstate commerce, a proposition Petitioner does not contest. The Circuit Court, like the District Court, omitted consideration of the testimony, most of it uncontroverted, of the seventeen expert witnesses called by Petitioner. Directly contrary to NSPE's Board of Ethical Review opinions to which it made no reference, the Circuit Court incorrectly stated that the ethical rule has "universal sweep." [49] The documentary evidence, to the contrary, establishes that the rule has been scrupulously limited to cover only engineering work which immediately affects public safety.[50]

Having wrongly concluded with respect to the breadth of Petitioner's ethical rule that it reaches all engineering work, and having made no analysis of the reasons for or evidence supporting the rule, the Circuit Court proceeded to hold that "the rationalization offered by the Society does not justify the broad ban on all competitive bidding. . . ." [51] The Circuit Court did not explain how it could so hold while rejecting consideration of Petitioner's so-called "rationalization" for the ethical rule.

Similarly, while giving lip service to what it described as the "legitimate objective of preventing deceptively low bids," [52] the Circuit Court rejected coun-

[49] A-7.

[50] J.A. 1788-90, 2549-50, 2575-76, 2599-2600, 2620-21, 2667, 2751-52, 2788-89, 2805.

[51] A-9.

[52] A-10.

sel's offer to reformulate the ethical rule to remove any ambiguity or doubt that its only purpose is to protect public safety.[53]

In upholding application of the *per se* doctrine to this case, the Circuit Court stated that the rule of reason might apply to "ethical rules of professional associations narrowly confined to interdiction of abuses," [54] but rejected application of the rule of reason here, asserting that Petitioner's ethical rule "governs situations where there are no such dangers." [55] The Court made no attempt to reconcile that holding with its refusal to consider the evidence of those dangers. The Circuit Court suggested that Petitioner "may move the district court for modification of the decree" in light of a revised ethical canon,[56] but it did not state that such a revision should be considered under the rule of reason, nor did it intimate why reformulation of the ethical canon would bring a different antitrust standard into operation, if it would.

The Circuit Court also rejected Petitioner's contention that this Court's mandate required the District Court to consider the evidence.[57]

In one respect, the Circuit Court reversed the District Court judgment. The Circuit Court struck down, as violating the First Amendment, that portion of the judgment which required Petitioner to state affirmatively that it does not consider fee bidding in engineer-

[53] A-10.

[54] A-11-A-12.

[55] A-12.

[56] A-10.

[57] A-8.

ing to be unethical.[58] However, the Circuit Court did not address Petitioner's argument that the judgment pervasively abridges First Amendment rights.[59] The Circuit Court did not advert to Petitioner's argument that the judgment, to the extent it requires Petitioner to cease publication of its ethical beliefs, is an unconstitutional prior restraint.[60] Nor did the Circuit Court address Petitioner's contention that the judgment abridges First Amendment associational rights.[61] While the precise scope of the Circuit Court's modification of the judgment is subject to argument in District Court proceedings on remand, it is evident that the Circuit Court did not grant Petitioner the full constitutional relief it sought.

REASONS FOR GRANTING THE WRIT

1. Application of the *per se* Standard Herein to Professional Ethics is Contrary to This Court's Decisions, and Erases the Historic Distinction Between Solicitation of Work by Professionals and Solicitation of Work by Merchants.

Application of the *per se* doctrine to professional ethics, and particularly to professional ethics regarding solicitation, as involved here, is inconsistent with the Court's statements of that doctrine. Section 1 of the Sherman Act prohibits restraints of trade which are unreasonable. *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1 (1911). To be *per se* unreasonable, restraints of trade must have a "pernicious effect on competition and lack of any redeeming virtue." *Northern Pacific Ry.* v. *United States,* [illegible] U.S.

[58] A-12-A-13.

[59] Brief for Appellant in the Court of Appeals at 38-41.

[60] *Id.* at 38-39.

[61] *Id.* at 39-40.

1, 5 (1958). The rule of *per se* was not intended to prohibit activities which are reasonable and ethical, but only those so "pernicious" that the administration of justice would be ill served by an effort to justify them. As the Court stated in *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918):

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains.
>
> * * * *
>
> . . . the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

With the exception of the lower courts in this case, no court has ever applied the *per se* doctrine to the ethics of a learned profession. Such a holding, which rejects consideration of the factual context, purposes and effects of the ethics, is inconsistent with *White Motor Co.* v. *United States,* 372 U.S. 253, 263 (1963), which requires the courts to consider "the actual impact," "the economic and business stuff," of the offense alleged, to decide whether the conduct attacked has "a pernicious effect" and "lack [of] any redeeming virtue." *See also Maple Flooring Mfrs. Assn.* v. *United States,* 268 U.S. 563, 579 (1925); *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344 (1933); *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545, 555-56 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961).

In *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), the Court held a lawyers' minimum fee schedule unlawful, but the Court conspicuously did not apply the *per se rule.* The Court stated that

> [t]he fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today. 421 U.S. at 787 n. 17.

Petitioners in *Goldfarb* made no showing that the fee schedule was required for the protection of the public or for any other legitimate reason. NSPE neither maintains nor defends any fee schedule. In *Goldfarb,* petitioners contended that the Sherman Act did not apply to the practice of law. This Court held otherwise. NSPE does not seek reversal of any aspect of that case.

In the instant case a massive showing was made that the ethical principle at issue is needed for the competent and safe practice of engineering, and is in the public interest. The lower courts refused to consider that evidence. That such evidence was presented in this case rebuts the often-heard canard that application of the rule of reason in such a case would bog down the administration of justice. It is the lower

courts' refusal to consider the evidence of reasonableness, and not Petitioner's presentation of that evidence, that has protracted this case. The evidentiary record here demonstrates that it is entirely feasible for courts to determine the reasonableness of professional ethics. Application of the *per se* rule in this case elevates expedience over justice and the public interest.

The relation of an ethical canon's scope to the evil which the canon seeks to root out is an appropriate consideration for the courts in determining whether the canon is reasonable. However, that comparison can be made rationally only if the court examines the evil at which the canon is aimed, in the context of the professional practices involved. This the lower courts refused to do.

The lower courts' refusal to consider the evidence is all the more egregious in light of prevailing laws and legislative history on point, which the lower courts ignored. Statutes, regulations and judicial decisions specifying a course of conduct establish a standard of reasonableness as a matter of law. *Martin* v. *Herzog,* 228 N.Y. 164, 126 N.E. 814 (1920) (Cardozo, J.); O. Holmes, *The Common Law,* 89-90 (Howe ed., 1967); W. Prosser, *Law of Torts,* 188-204 (1971). State and federal laws are legion which hold fee bidding a forbidden and unreasonable method of obtaining engineering services. *See* A-21-A-50; A-60-A-62. Petitioner does not contend that these laws comprise an exemption from the Sherman Act. Rather, Petitioner contends that they are evidence of and establish the reasonableness of Section 11(c). *See Reconstruction Finance Corp.* v. *Beaver County,* 328 U.S. 204, 210 (1946).

Federal policy on the subject of this case dates from 1925, when, in taking the then-novel step of retaining

outside professional engineers, Congress authorized retainer agreements "without reference to civil service requirements," Pub. L. No. 68-463 (February 24, 1925), and "in accordance with the usual customs of their several professions," Pub. L. No. 69-141 (April 22, 1926).

In 1939, S. Rep. No. 263, 76th Cong., 1st Sess., stated,

> It is desired to eliminate advertising for engineering and architectural services, as required by Section 3709 of the Revised Statutes . . . . because responding to advertising for professional services of this character is considered to be unethical.
>
> Furthermore, it is as illogical to advertise for services of a shipbuilding or other engineering specialist as it would be to advertise for the services of a medical specialist . . . . The question in each case should be decided upon the special qualifications of the firms under consideration. *Id.* at 23.

The foregoing Report resulted in enactment of 10 U.S.C. § 7212, and is illustrative of a long line of Congressional declarations on this subject. In its Report on one such statute, the Brooks Act (40 U.S.C. §§ 541-44) (Supp. II, 1972), the House Committee on Government Operations found as follows:

> [T]he committee concludes that the traditional system of architectural and engineering service procurement utilized by the Federal Government, as well as other public bodies, business and private industry, constitutes the most effective and efficient manner to acquire these professional services, and that regular competitive negotiation procedures not be applied to A/E [architect/engineer] procurement. H.R. Rep. No. 92-1188, 92d Cong., 2d Sess. 2 (1972).

> . . . . regular competitive negotiation, where each potential contractor is pitted against the others in terms of fee and quality of his product or service, does not provide an optimum method of procuring A/E services for the Government, or anyone else. Even were A/E fees reduced somewhat, the 'savings' would inevitably be reflected in a reduction in the A/E's design costs rather than his projected margin of profit. This in turn means that the Government would tend to obtain lower quality plans and specifications which could mean high construction and maintenance costs and, generally, lower quality buildings and other facilities. *Id.* at 4.

The Senate Committee on Government Operations found that:

> The procurement of architectural and engineering services has traditionally been recognized as presenting unique considerations. Like the medical and legal professions, the architectural and engineering professions demand abundant learning, skill, and integrity, requiring a broad spectrum of capabilities that for the best results must be closely matched with the needs and requirements of those who contract for them. S. Rep. No. 92-1219, 92d Cong., 2d Sess. 4 (1972).
>
> The enactment of H.R. 12807 [the Brooks Bill] would insure the continuation of the Government's basic procurement procedure, with respect to architectural and engineering services, which has been in operation for more than 30 years. It is also the traditional system of procurement for similar services utilized by State and local governments. *Id.* at 6.

These are only a few of the findings of Congress which, like the federal agencies' and departments' comparable findings, bear on the issue of reasonable-

ness in this case. United States policy, declared in all of the statutes and regulations on point, is the same as the policy stated in Petitioner's Code.

These Congressional determinations are obviously relevant. Petitioner contends they are reasonable as a matter of law. Under their exclusionary *per se* decision of the case, the lower courts took no notice of Congress' findings, or of the state laws and decisions on point.

Limitations on methods of solicitation of work are a hallmark of the professions.[62] The value of limiting solicitation by professionals in socially proper ways has stood the test of time. If the *per se* judgment in this case is upheld, those limitations will be mechanically eradicated. The highest court should act before such a drastic change in social policy is made.

2. Application of the *per se* Standard in This Case Conflicts With the Law of Other Circuits.

Petitioner's members, who are directly affected by the judgment herein, reside in every state of the United States. Had this case been brought in another circuit the rule of reason would have been applied, consistent with recently announced law of the other circuits. Review of this case by the Court is necessary to harmonize the law of the circuit courts on point.

In *Evans* v. *S.S. Kresge Co.*, 544 F.2d 1184, 1190-93 (1976), the Third Circuit applied the rule of reason, rejecting the *per se* standard, to a licensee's antitrust claim against a discount department store. The court's grounds for so holding were that the business relation-

[62] J.A. 1446-48, 1456-57, 1462, 1502-03, 5478-79; DX 40, pages 213, 214; DX 211; DX 212.

ship between the two was not "one with which the courts have had 'considerable experience'" and the challenged restrictions were not "naked restraints with no purpose except [the] stifling of competition." *Id.* at 1191.

In *Mackey* v. *National Football League,* 543 F.2d 606, 618-20 (1976), the Eighth Circuit held that the rule of reason, not *per se,* applies to the "Rozelle Rule", a group boycott practice governing employment of football players. "[W]e conclude", said the court, "that the unique nature of professional football renders it inappropriate to mechanically apply *per se* illegality rules here, fashioned in a different context." *Id.* at 619. *See also Quality Mercury, Inc.* v. *Ford Motor Co.,* 542 F.2d 466 (8th Cir. 1976).

In *Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.,* 549 F.2d 368, 379-80 (1977), the Fifth Circuit held that the rule of reason, not the *per se* rule, applies to approved-source requirements of franchisors. Noting that such tying arrangements had often been held *per se* illegal, the court declined to apply that standard, holding that "Here, as elsewhere, the *per se* label can sometimes prove misleading." *Id.* at 375. The Fifth Circuit likewise applied the rule of reason to a quarter-horse association's group boycott of a colt with "excessive white markings." *Hatley* v. *American Quarter Horse Assn.,* 1977-1 Trade Cases ¶ 61,441 (1977). *See also Response of Carolina, Inc.* v. *Leasco Response, Inc.,* 537 F.2d 1307 (5th Cir. 1976).

Likewise, the Seventh Circuit rejected the *per se* rule, and applied the rule of reason, in *Moraine Products* v. *ICI America, Inc.,* 538 F.2d 134, *cert. denied,* 97 S.Ct. 357 (1976), involving an antitrust claim, re-

specting mutual exclusive patent licenses, made by a patent assignee. To apply *per se* in such a case, the court held, "would draw a line differentiating legal and illegal practices upon a presumption not fairly drawn from the factual realities . . . ." *Id.* at 145.

The foregoing cases by no means exhaust the recent authorities in other circuits applying the rule of reason to antitrust questions far less novel and important than presented here. Unless the Court reviews this case, the outcome of Sherman Act Section 1 cases involving professional ethics will depend on the circuit in which the case is brought; and where, as here, national associations are involved, forum shopping is likely to be rewarded in such cases.

3. The Judgment in This Case Jeopardizes Public Safety.

The risks to the public of the practice at which Petitioner's ethical rule is aimed are set forth in the Statement of the Case, *supra*. The record shows that these risks are grave and pervasive. Courts are accustomed to statements by litigants of horrible consequences, and courts are entitled to be skeptical. However, the lower courts in this case were not skeptical; rather they chose simply not to consider the evidence, concluding that the *per se* rule made the evidence superfluous. Petitioner seeks to have the facts considered and weighed, which can be done only under the rule of reason.

4. The Judgment in This Case Abridges Petitioner's First Amendment Rights by Prohibiting It From Stating Views or Advocating a Policy It Believes Essential to Public Safety.

A. The judgment unconstitutionally enjoins speech.

The judgment herein[63] abridges First Amendment rights by prohibiting Petitioner and its officers and members from stating or advocating a view they consider essential to public safety and welfare. The District Court adopted as its judgment a sweeping eight-page order which recited verbatim every provision requested by Respondent, and nothing else. It cannot be doubted that the judgment in this case enjoins speech. Paragraph VII, for example, provides:

> *The defendant is enjoined and restrained from adopting or disseminating* in *any* of its publications or otherwise, any Code of Ethics, opinion of its Board of Ethical Review, policy *statement*, rule, by-law, resolution or guideline . . . which states or *implies* that the submission of price quotations for engineering services or *that competition by members of the defendant based upon engineering fees is unethical, unprofessional, contrary to the public interest or contrary to any policy of the defendant.* (Emphasis added.)

There is a very strong presumption against the constitutional validity of any such prior restraint on expression. *New York Times Co.* v. *United States,* 403 U.S. 713 (1971); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971); *Near* v. *Minnesota,* 283 U.S. 697 (1931). In *New York Times Co.* v. *United States,* this Court, in the face of claims that the very security of the nation was imperiled by the publication

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[63] A-15-A-20.

sought to be enjoined, held that such an injunction was inconsistent with the First Amendment's fundamental guarantee of freedom of expression.

In *Virginia State Board of Pharmacy* v. *Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976), the Court stated that the First Amendment protects the right to advocate professional restrictions even though the restrictions advocated are illegal.

The exceedingly broad restraints on expression imposed by the judgment cannot be justified as necessary to prevent violations of the Sherman Act, even assuming the judgment were otherwise upheld. The Court held in *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961), that the Sherman Act cannot be applied to prohibit an organization from advocating a public position, since to do so would deprive the government of a valuable source of information and abridge the right of petition. *See also United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965). Affirmative undertakings by Petitioner compelled by the judgment, even as modified by the Circuit Court, would unconstitutionally require Petitioner to use its publications as a "billboard" for views it considers obnoxious. *Wooley* v. *Maynard*, —— U.S. ——, 45 U.S.L.W. 4379 (April 20, 1977); *see* A-17-A-18. Even commercial implications of speech do not justify "narrowing the protection of expression secured by the First Amendment". *Bigelow* v. *Virginia*, 421 U.S. 809, 818 (1975). The judgment in this case unconstitutionally enjoins Petitioner and its officers and members from advocating a policy they consider essential to public safety.

B. The judgment abridges the right to free association.

Additionally, the judgment in this case blatantly abridges the First Amendment right of association. Senator Sherman, in advocating the legislation on which the judgment purports to be based, said that the Sherman Act

> . . . does not interfere in the slightest degree with voluntary associations made to affect public opinion. 21 Cong. Rec. 3.2557 (March 24, 1890).

Cf. H. Thorelli, *The Federal Antitrust Policy* 164ff. (1955). The judgment, however, prohibits Petitioner's members from associating to advance their belief that certain forms of conduct in their profession are unethical. As the Court stated in *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958),

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of . . . freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . .

See also NAACP v. *Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964) (a group boycott, even if it violates a valid law, may not constitutionally be the basis for an injunction against the right to associate to advocate ideas).

5. This Court's Mandate Herein Required the District Court to Consider the Evidence of the Ethical Rule's Reasonableness. The Circuit Court Erred in Affirming the District Court's Refusal To Do So.

Contrary to the lower courts' view, Petitioner contends that this Court's vacation of the District Court judgment and remand for reconsideration in light of *Goldfarb* v. *Virginia State Bar, supra,* was not a meaningless formality. This is only the second antitrust case decided summarily by this Court since 1965 in which such a mandate has issued. The other, *United States* v. *Continental Oil Co.,* 387 U.S. 424 (1967), arose under Clayton Act § 7. There the Court, on a direct appeal, summarily vacated a district court judgment and remanded for reconsideration in light of *United States* v. *Pabst Brewing Co.,* 384 U.S. 546 (1966). On reconsideration, the district court in *Continental Oil* reversed itself. 1968 Trade Cases ¶ 72,374 (D.N.M.). On the second direct appeal, this Court summarily affirmed. 393 U.S. 79 (1968).

The Court has stated that vacation of a judgment with instructions to reconsider in light of an intervening precedent is tantamount to reversal. In *Henry* v. *City of Rock Hill,* 375 U.S. 6 (1963), the Court vacated a South Carolina Supreme Court judgment and remanded for reconsideration in light of *Edwards* v. *South Carolina,* 372 U.S. 229 (1963). On remand, the South Carolina court reaffirmed itself, notwithstanding this Court's action. Appeal was taken, and this Court reversed. 376 U.S. 776 (1964). Explaining the significance of its vacation of judgment and reversal of the lower court's second decision, the Court stated:

> That has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent, we remand the case to the state court for reconsideration. . . . The South Carolina Supreme Court correctly concluded that our earlier remand did not amount to a final determination on the merits. That order did, however, indicate that we found *Edwards* sufficiently analogous and, perhaps, decisive to compel re-examination of the case. 376 U.S. at 776-77 (footnote omitted).

Thus, the lower courts' view, that this Court's mandate was a mere technicality, is unsupportable.

Petitioner believes the Court intended that the District Court should not slavishly adopt as the *ratio decidendi* of this case a theory, *per se,* never before applied to professional ethics. Petitioner believes the Court intended that the District Court should take legal cognizance of the evidence regarding the dangers of fee bidding in engineering, to the end that the District Court could determine whether "features of [that] profession . . . require that [this] particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Goldfarb, supra,* 421 U.S. at 788 n. 17. That is the standard *Goldfarb* makes applicable here.

As the Court stated in *Goldfarb,* 421 U.S. at 792, "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession" (quoting *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 336 (1952)). In *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608, 612 (1935), the Court said this:

> The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but

> protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises . . . . And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.

Petitioner believes that this Court recognized that there is no way to do justice in this case without considering the facts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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